Supreme Court, U.S.
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No. 00-1539

IN THE

Supreme Court of the United States

SAMUEL D. MOORE, *et al.*,

Petitioners,

v.

AFTRA HEALTH AND RETIREMENT FUNDS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT AFTRA HEALTH AND RETIREMENT FUNDS TRUSTEES

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QUESTION PRESENTED

The only question presented by Petitioners that is applicable to Respondents AFTRA Health & Retirement Funds Trustees is Petitioners' Question 2. This question should properly be: Was it an abuse of discretion for the district court to deny class certification pursuant to Federal Rule of Civil Procedure 23 with respect to a claim alleging breach of fiduciary duty under Section 502(a)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") where proof of the breach requires highly individualized factual determinations that differed with respect to each of numerous class members?

STATEMENT PURSUANT TO RULE 29.6

Supreme Court Rule 29.6 does not apply to Respondents AFTRA Health & Retirement Funds Trustees because the Trustees are not a nongovernmental corporation.

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STATEMENT OF THE CASE

A. Background

1. The AFTRA Health & Retirement Funds

The AFTRA Health & Retirement Funds (the "Funds") are employee benefit plans within the meaning of ERISA § 1001, *et seq.* The Funds are administered by a Board of Trustees (the "Trustees"), who are fiduciaries of the Funds within the meaning of § 3(21)(A) of ERISA, ten of whom are appointed by the American Federation of Television and Radio Artists ("AFTRA") the collective bargaining representative for most of the Funds' participants, and ten of whom are appointed by employers who are signatories to collective bargaining agreements with AFTRA and who make contributions to the Funds.

2. The Phono Code

Eligibility for benefits under the Funds is based on an individual's "covered earnings," *i.e.*, earnings under an AFTRA Code or collective bargaining agreement requiring contributions to the Funds. The National Code of Fair Practice for Phonographic Recordings (the "Phono Code") is one such collective bargaining agreement. The Phono Code covers vocal recording artists and is signed by record companies who engage those artists.

The Phono Code requires that record company signatories make contributions to the Funds based on a percentage of the earnings paid to individual recording artists by a record company for work covered by the Phono Code, which the Phono Code refers to as "Gross Compensation."

The Funds determine whether an individual artist is eligible for benefits based on the artist's covered earnings in a given year, including "Gross Compensation" as defined by the Phono Code. Thus, both the amount of contributions employers must pay the Funds, and the earnings that should be credited to each artist for purposes of determining eligibility for, and the amount of, benefits under each Fund, depend on the amount of "covered earnings" generated by each artist. What constitutes "covered earnings" (including "Gross Compensation" under the Phono Code) depends on (i) the nature of the work performed by the artist; (ii) for whom the work was performed; (iii) when the work was performed; (iv) where the work was performed; and (v) the amount paid to the artist. Stated differently, both the obligation of an employer to make contributions to the Funds, and an individual participant's eligibility for Funds benefits, are based on the same highly individualized participant compensation arrangements and earnings information.

Adding to this complexity, although the Phono Code requires that contributions to the Funds be made on "Gross Compensation" paid to an artist, it does not define this term. When the Phono Code first was amended in 1959 to require contributions to the Funds, the determination of what constituted "Gross Compensation" was relatively straightforward because artists typically were paid directly by a record company. However, as the method by which record companies compensated artists became more complicated, and payments were frequently not made directly to the artist but rather indirectly through other entities and through more complex arrangements, a multitude of disputes arose between the record companies and the Funds regarding contribution obligations to the Funds.

3. The Funds' Contribution Collection and Audit Procedures

The Funds have had procedures in place to insure that contributing employers make required contributions to the Funds on a regular basis. Specifically, when payments are not received when expected from record companies, the Funds timely demand that payments be made. The Funds routinely consult trade publications and other information sources concerning record sales to confirm that the necessary contributions are made to the Funds.

Finally, the Funds also have an established and comprehensive program for auditing contributing employers, including Phono Code employers, to verify that the proper contributions on earnings have been made, and have hired both inside and outside auditors to assist them in this endeavor. Because an employer's contribution obligations are highly individualized, based on individual artist earnings, the audit process must necessarily focus on the unique earnings of each individual recording artist. Thus, the quintessential characteristic of the Funds' audit process is (i) a particularized examination of contributions made on behalf of each individual artist, as compared to (ii) the covered earnings that the audited record company actually paid to each individual artist during the covered time period. Not surprisingly, audit reports are performer-by-performer analyses of earnings histories. Accordingly, audits are conducted, and settled, on a performer-by-performer basis.

4. The Petitioners' Claims

Petitioners are fifteen present and former artists in the recording industry and the alleged beneficiaries of three deceased

performers. They commenced this action in October 1993 against the Funds, the Funds Trustees, AFTRA, and numerous record company signatories to the Phono Code. The gravamen of all their claims is that the record companies did not make the required contributions to the Funds under the Phono Code based on Petitioners' Gross Compensation under the Phono Code, and that Petitioners were not credited by the Funds with all of their Gross Compensation, thereby adversely affecting their benefits under the Funds. (Petition, at 4, 6). Petitioners sued the Funds for failure to pay the benefits to which they claimed they were entitled, and they sued the Funds Trustees and AFTRA for breach of fiduciary duty for not collecting all of the contributions they believe should have been collected. They also sued the record company respondents for failing to pay those contributions and report the covered earnings. The suit was purportedly brought on behalf of a class of thousands of Funds participants and beneficiaries.

B. The District Court's Denial of Class Certification

Petitioners moved in the district court pursuant to Rule 23 for class certification of their benefits claims against the Funds, fiduciary breach claims against the Funds Trustees, and RICO claims against the record companies. With respect to plaintiffs' fiduciary breach claims, Petitioners do not challenge a single or discrete act or decision of the Trustees, such as making a particular imprudent investment of plan assets, or imprudently retaining a particular insurance carrier. Rather, they seek to litigate numerous highly individualized, fact-specific issues including: (i) the Trustees' alleged failure to collect contributions due from record companies based on the unique earnings of a multitude of artists signed to those record companies; and (ii) the Trustees'

alleged failure prudently to conduct and settle audits intended to ensure that the appropriate contributions were received from record companies with respect to each of their signed recording artists. (Petition, at 6-9).

Applying the standards under Rule 23, the district court denied Petitioners' motions for class certification. With respect to the benefits claims, the court concluded that "each class member's potential claim for benefits will have to be determined based on individual facts unique to that class member" and would "require the court to make a factual inquiry into each class members' recording and earning history before determining whether the Funds defendants wrongfully denied benefits or failed to properly credit a participant's account." (Petition, Appendix C, at 35a-36a). Accordingly, neither the requirements of Rule 23(a) nor Rule 23(b) for class certification were satisfied with respect to Petitioners' benefits claims. Petitioners did not appeal this determination.

The district court also concluded that Petitioners' fiduciary breach claims did not meet the requirements of Rule 23(a) or 23(b). With respect to the requirements of Rule 23(a), the court held that the fiduciary breach claims would "require individualized proof similar to that necessary to prove plaintiffs' benefits claims," and therefore failed to satisfy the typicality requirement. (Petition, Appendix C, at 36a). The court also held that the Petitioners had not met their burden of satisfying the prerequisites of Rule 23(b)(1) for a non-opt out class because it concluded that "a finding in favor of plaintiffs on their breach of fiduciary duty claims would not be dispositive of the claims of absent class members" and, further, that "[e]ach plaintiff's breach of fiduciary duty claims are individualized such that there is no substantial risk of prejudice to absent class members." (Petition, Appendix C, at 37a).

Finally, the district court held that certification of a non-opt out class under Rule 23(b)(2) also was inappropriate because the Trustees had not "acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2). As the district court explained, "[w]hether the Funds Trustees acted inappropriately in calculating benefits and pursuing contributions will require a separate determination for each individual plaintiff. The necessity for this individualized inquiry is inconsistent with plaintiffs' argument that the Trustees have acted on grounds applicable to the class as a whole." (Petition, Appendix C, at 37a).

C. The Eleventh Circuit Decision

Petitioners did not appeal the denial of class certification of their benefits claims. With respect to the fiduciary breach claim, the Eleventh Circuit held that the district court did not abuse its discretion in denying class certification. The court noted that to determine whether the record company defendants owed anything to the Funds, "the district court would have to examine each singer's contract with the record company." (Petition, Appendix A, at 10a). The court pointed out that the district court also would have to consider the impact, if any, of the Trustees' periodic reviews of the record companies' individual statements to the performer concerning his or her earnings, and the effect of these audits on a given record company's contribution to the Funds. (Petition, Appendix A, at 10a-11a). "In sum, each case — those of the named plaintiffs and the putative class members as well — is different: the financial arrangements and the steps the Trustees took to ensure the record companies' compliance with the Phono Code differ." (Petition, Appendix A, at 11a).[1]

1. Petitioners' statement that the lower courts ruled that class certification was denied "because petitioners were pressing claims

(Cont'd)

Based on the foregoing, the Court concluded that it was "doubtful, at the very least," whether Petitioners could satisfy the typicality requirement of Rule 23(a), or any of the conditions of Rule 23(b), and "[h]aving drawn these conclusions, we could hardly say that the district court abused its discretion in refusing to certify a class" with respect to Petitioners' breach of fiduciary duty claims. (Petition, Appendix A, at 11a).

SUMMARY OF ARGUMENT

The determination of whether class certification is appropriate under Federal Rule of Civil Procedure 23 is committed to the discretion of the district court. A plaintiff seeking class certification has the burden of proving that the requirements of both Rule 23(a) and 23(b) have been satisfied. Rule 23(a) requires that before certifying a class the district court must conclude, among other things, that the claims of the named representatives are typical of the claims of absent class members. Courts uniformly have held that this requirement cannot be satisfied where the claims asserted require individualized proof, *i.e.*, proof that differs for each class member. Even if common legal theories or overarching legal issues exist, typicality cannot be satisfied if individualized proof is required to prove the claim, as it is here.

(Cont'd)
for individual relief" (Petition, at 17) is incorrect. The focus of both lower courts properly was on the nature of the proof, not the nature of the relief being sought. As such, the lower courts' decisions were entirely consistent with *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

The district court did not abuse its discretion in holding that Petitioners' fiduciary breach claims would require individualized proof because there was ample evidence in the record, as the Eleventh Circuit found, to support this holding. The core of Petitioners' breach of fiduciary duty claim is that the Trustees allegedly failed to collect the required contributions from the record company defendants, and that it was imprudent for the Trustees to settle claims for what plaintiffs believe to be less than what was actually owed to the Funds. The necessary initial inquiry, therefore, must be what contributions actually were owed by the record companies. There is simply no way to determine whether the Trustees failed to insure that contributions actually owed were paid, or that the Trustees imprudently settled contribution claims against the record companies, unless Petitioners first prove, as the initial step in their attempt to prove their claims that additional contributions were in fact due. In this critical respect, this case is different from those ERISA fiduciary breach cases in which the plaintiffs challenge one act, or a discrete number of related acts, that they allege to be a breach of fiduciary duty. Those cases might warrant class treatment precisely because there are no individualized issues. In this case, however, the district court found that determining what contributions are owed to the Funds necessarily requires determination of each individual artist's Gross Compensation under the Phono Code. By its very nature, this initial determination requires individualized proof differing from class member to class member, thereby precluding a finding of typicality necessary for class certification. It was not an abuse of discretion for the district court to reach this conclusion, and its exercise of discretion to deny class certification does not warrant a grant of certiorari.

The necessity for individualized proof also renders inappropriate certification of a non-opt out class under Rule 23(b)(1)(B). There is no risk that a determination of a named plaintiff's actual Gross Compensation, the baseline from which the appropriate amount of contributions to the Funds is determined, will be dispositive of a claim for breach of fiduciary duty based on another class member's gross compensation, precisely because of the highly individualized nature of these determinations. The requirements of Rule 23(b)(1)(B) therefore cannot possibly be satisfied.

Petitioners' principal contention is that the district court erred in concluding that their fiduciary breach claims required individualized proof, and that the court was required to certify a class action because Petitioners' fiduciary breach claims seek recovery on behalf of the Funds, not the individual Petitioners. (Petition, at 19-20). Acceptance of this argument would obviate the application of the standards set forth in Rule 23 in determining whether class certification was appropriate in ERISA breach of fiduciary duty cases. It would require that all such claims be certified as class actions automatically, and without considering Rule 23, simply because relief can only be awarded to the plan. There is absolutely no support for such a contention, and ERISA in fact specifically provides that individual participants can bring fiduciary breach claims. Thus, Petitioners' principal contention is unsupported by, and indeed contrary to, applicable law.

The lower courts simply applied the standards set forth in Rule 23, and recognized that to the extent the Petitioners seek to litigate, on a class-wide basis, the highly individualized issues of what contributions were actually owed to the Funds with respect to the earnings of each

member of the class, their claims would require individualized proof that renders class certification inappropriate. Such a conclusion is not inconsistent with any decision of this Court, any other Court of Appeals, or any established rule of law. It provides no basis for a grant of certiorari.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT PROPERLY CONCLUDED THAT THE DISTRICT COURT HAD NOT ABUSED ITS DISCRETION IN CONCLUDING THAT THE TYPICALITY REQUIREMENT OF RULE 23(a) HAD NOT BEEN SATISFIED, AND THAT NO CONDITION OF RULE 23(b) HAD BEEN SATISFIED

District courts have broad discretion whether to certify a class, and their decisions are reviewed under an abuse of discretion standard. *Amchem Prods. v. Windsor*, 521 U.S. 591, 630, 636 (1997) (Breyer, J., concurring in part and dissenting in part); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982); *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *see also Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997); *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 136 (3d Cir. 2000); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740, 752 (5th Cir. 1996); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996); *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233-34 (9th Cir. 1996); *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 455 (11th Cir. 1996). Under this standard, the conclusion reached by the Eleventh Circuit Court of Appeals that the district court had not abused its discretion in finding that the Rule 23

requirements for class certification had not been satisfied with respect to Petitioners' breach of fiduciary duty claims should not be disturbed.

To satisfy Rule 23(a)'s typicality requirement, "the named representatives must be able to establish the bulk of the elements of each class member's claims when they prove their own claims." *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 58 (S.D. Fla. 1990); *see also Love v. Turlington*, 733 F.2d 1562, 1563 (11th Cir. 1984). " 'Typicality entails an inquiry whether "the named plaintiff's individual circumstances are markedly different or . . . the legal theories upon which the claims are based differs from that upon which the claims or other class members will perforce be based." ' " *Baby Neal v. Casey*, 43 F.3d 48, 57-58 (3d Cir. 1994) (citations omitted). Typicality requires "that a class representative 'have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions.' " *In re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119, 126 (S.D.N.Y. 1997) (citations omitted).

Applying this standard, courts have routinely found that Rule 23(a)'s typicality requirement is not satisfied where the claims asserted by the putative class representatives are "grounded in factual situations differing from those of other class members." *Brooks*, 133 F.R.D. at 58. *See, e.g., Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir.) (district court abused its discretion in granting class certification for ERISA breach of fiduciary duty claims because the typicality requirement had not been met when "[e]ach claim, after all, depended on each individual's particular interactions with [the defendant] — and these, as we have said, varied from

person to person"), *cert. denied*, 524 U.S. 923 (1998); *Swoope v. BellSouth Telecomms., Inc.*, Nos. Civ.A. 1:97CV181-D-D, Civ.A. 1:97CV359-D-D, 1998 WL 433952, at *2 (N.D. Miss. June 23, 1998) (denying class certification of ERISA fiduciary breach claims because plaintiffs' claims were not typical of those of absent class members); *Brown v. Utilicorp United, Inc.*, No. 97 Civ. 1277, 1998 WL 166593, at *2-3 (D. Kan. Feb. 24, 1998) (necessity for "individualized proof" precluded finding of typicality under Rule 23(a)).

In this case, there is no dispute that a record company's obligation to make contributions to the Funds is based on each individual artist's covered earnings (or "Gross Compensation" in the terminology of the Phono Code) in a given year. Thus, to prove that the Trustees breached their fiduciary duty under ERISA by not collecting contributions that were due, Petitioners must, at a minimum and as a first step, present evidence of covered earnings that had not previously been reported by the record companies or credited by the Funds. Such a determination can only be made on an artist-by-artist basis, as the lower courts concluded, and is therefore highly individualized.

For example, in order to demonstrate that the Trustees, purportedly in breach of their fiduciary duty, allowed the record company defendants to avoid their contractual and statutory obligations by not collecting required contributions, which they characterized as the "gravamen" of their claims (Petition, at 4), Petitioners would necessarily first have to demonstrate what was, in fact, owed by each record company during a particular period of time for each recording artist signed to that record company and covered by the Funds. This preliminary factual determination is fundamentally

necessary in order then to determine whether earnings reports submitted to the Funds by the record companies were "accurate," and whether additional contributions were in fact "required" with respect to those earnings. Because contribution obligations are determined on a performer-by-performer basis under the Phono Code, Petitioners would have to present evidence of the covered earnings of each artist on whose behalf a claim for earnings is made. Only by analyzing this detailed evidence could a determination be made as to whether the Trustees acted imprudently by not collecting delinquent contributions or in settling contribution claims. (*See* Petition, at 20). The necessity for such individualized determinations precludes a finding of typicality, and this was precisely the conclusion of the courts below. (Petition, Appendix A, at 10a-11a, Appendix C, at 36a-17a).

None of the cases Petitioners cite in support of their argument that their class should be certified involves allegations similar to the individualized nature of the fiduciary breach claims in this case. Rather, each of the cases on which Petitioners rely in which a court certified an ERISA fiduciary breach class involved, without exception, a single or discrete act (or closely related acts) by ERISA plan fiduciaries (such as trustees) occurring at a particular point in time and impacting all potential class members in exactly the same way. *Specialty Cabinets & Fixtures, Inc. v. Am. Equitable Life Insurance Co.*, 140 F.R.D. 474 (S.D. Ga. 1991), most clearly demonstrates this point. That case involved an agreed-upon class that was certified for settlement purposes. Plaintiffs had alleged that the defendants "breached their fiduciary duties by permitting the insurance carrier for the Dimensional Group Trust to be changed to an insolvent insurance carrier." *Id.* at 475. The district court in

that case specifically noted that class certification was appropriate in that case because "only one suit should be brought to remedy *a particular breach* of fiduciary duty." *Id.* at 478 (emphasis added). In contrast, in this case Petitioners do not seek to remedy "a particular breach" of fiduciary duty, but rather seek to have the district court adjudicate thousands of potential fiduciary breach claims occurring over more than a thirty-five year period, which they necessarily must do in order to prove the "systemic abuses" which they allege. (Petition, at 18).

Kane v. United Indep. Union Welfare Fund, No. 97 Civ. 1505, 1998 WL 78985 (E.D. Pa. Feb. 24, 1998), is equally inapposite. In that case, the defendant trustees were accused of engaging in specific discrete prohibited transactions. Specifically, plaintiffs alleged that the trustees had made direct payments to the union, leased fund property to the union, allowed the union to use fund resources, and contracted exclusively with the union as fund administrator, in violation of 29 U.S.C. § 1106 (2000). *Kane*, 1998 WL 78985, at *2, *7. The court held, with little analysis, that the claims were typical because the allegations asserted a common question relating to all fund participants (whether the trustees had engaged in particular transactions with the union that were specifically proscribed by statute), and it was not necessary to examine the prudence exercised by the trustees because the acts themselves were prohibited.

In sharp contrast, in this case Petitioners do not take issue simply with whether or not the Trustees took certain actions, but rather with the manner in which they performed their functions in a vast number of individualized circumstances. Moreover, Petitioners' suggestion that the district court in *Kane* certified plaintiffs' breach of fiduciary

duty claims simply because the claims were asserted in a representative capacity is incorrect. (Petition, at 19). The *Kane* court carefully examined each requirement of Rule 23 and, in its discretion, certified a class for the fiduciary breach claims. Simply alleging that an action is asserted in a representative capacity does not determine whether a class action may be maintained. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982).

In short, the Eleventh Circuit properly determined that the district court's decision regarding typicality was within that court's discretion. Given the allegations of the complaint, no class claim for breach of fiduciary duty can be litigated without, in the first instance, presenting individualized proof of the alleged failures to collect the proper amount of contributions. Petitioners' breach of fiduciary duty claims seek to challenge a multitude of individual decisions, a challenge that by its very nature precludes a finding that Petitioners' claims are typical of those of the class. Petitioners may disagree with the district court's conclusion that individualized proof is necessary in order to establish their breach of fiduciary claims asserted in this case. Disagreement with a discretionary determination is not, however, sufficient to establish an abuse of discretion and certainly is no basis for this Court to grant certiorari.

The Eleventh Circuit also held that it was "doubtful" that any of Rule 23(b)'s conditions could be satisfied given the highly individualized nature of the proof that would be required to establish the breach of fiduciary duty claim. (Petition, Appendix A, at 11a). This holding also was well within the discretion afforded to the lower courts in the management of litigation.

Rule 23(b)(1)(B) provides that a case may not be certified as a class action unless the requirements of Rule 23(a) are satisfied *and* prosecution of separate actions by or against individual class members would create a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." This Rule is designed to avoid "[t]he difficulties which would be likely to arise if resort were had to separate actions" and to avoid prejudice against the class members themselves. *See* Fed. R. Civ. P. 23(b)(1) Advisory Committee Notes (1966 Amendment). Petitioners argue that a finding in their favor on the fiduciary breach claims would be dispositive of the rights of those not named because they are suing derivatively on behalf of the Funds. (Petition, at 19). Although this might be true in a case such as *Mertens v. Kaiser Steel Retirement Plan*, 744 F. Supp. 917 (N.D. Cal. 1990), *aff'd sub. nom.*, *Mertens v. Black*, 948 F.2d 1105 (9th Cir. 1991), where the plaintiffs challenge a single act (or related acts) as constituting a breach of fiduciary duty, it is not true where, as here, Petitioners challenge a multitude of individual acts.

Moreover, a finding that the Trustees breached their fiduciary duty by failing to collect sufficient contributions from the appropriate record companies with respect to one Petitioner will have no impact on a similar claim brought by any other named or unnamed plaintiff. Indeed, it is precisely because Petitioners' breach of fiduciary duty claims are so individualized that there is no risk of prejudice to absent class members by adjudicating those cases individually. *See In re Dennis Greenman Secs. Litig.*, 829 F.2d 1539, 1545 n.8 (11th Cir. 1987); *Peachin v. Aetna Life Ins. Co.*, No. 92 Civ. 2739, 1996 U.S. Dist. LEXIS 558, at *16 (N.D. Ill. Jan. 16, 1996); *Doe v. Guardian Life Ins. Co.*, 145 F.R.D. 466, 477 (N.D. Ill. 1992).

Petitioners' argument that class certification of the breach of fiduciary duty claims is appropriate under Rule 23(b)(1)(B) solely because they assert "not their own claims for fiduciary breach, but rather the claims of the Funds themselves" (Petition, at 19) was properly rejected by the lower courts. If the district court had accepted plaintiffs' rationale, it would certify as a class action *every* ERISA breach of fiduciary duty claim brought before it since, as Petitioners recognize, all such claims are brought on behalf of a fund. (Petition, at 16). In essence, Petitioners contend that the Rule 23 standards for evaluating the propriety of class certification are inapplicable in ERISA breach of fiduciary duty cases. There is, however, simply no basis in statute or case law for such a proposition.

Finally, if Petitioners are permitted to pursue breach of fiduciary duty claims as a class, which necessarily will involve a determination of the "Gross Compensation" of every class member, there can be little doubt that class certification would itself prejudice absent class members. Individual performers are in the best position to know, and have evidence of, the "Gross Compensation" with which they should be credited. Pursuing claims that require a determination of their Gross Compensation (either for purposes of determining their benefits entitlement or a record company's contribution obligation) without their active participation would certainly prejudice their claims. Petitioners' attempt to certify this aspect of the case as a "mandatory non-opt out" class (Petition, at 20) further exacerbates this prejudice since most of the thousands of absent class members will have no practical choice but to sit by and watch claims related to their own "Gross Compensation" be litigated by those with no familiarity with their personal earnings histories, and no personal stake in

the outcome. If Petitioners press their fiduciary claims on a class basis without offering proof of the "Gross Compensation" of absent class members, the prejudice to absent class members in a non-opt out class will be far worse. Either result is directly at odds with the policies underlying Rule 23.

In sum, the Eleventh Circuit's analysis of these issues was sound, the proper law was applied, and the result was correct. There is, therefore, no basis for granting the petition.

II. THERE ARE NO COMPELLING REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's conclusion that the district court did not abuse its discretion by denying class certification with respect to an ERISA breach of fiduciary duty claim that required individualized proof does not conflict with any relevant decision of this Court. Petitioners make no argument that such a conflict exists. There also is no split of authority on the issue of mandatory class certification of ERISA fiduciary breach claims among the circuit courts of appeal. To the contrary, as explained above, courts uniformly have applied the Rule 23 class certification requirements in ERISA breach of fiduciary duty cases.

In addition, the lower courts did not depart from the "accepted and usual course of judicial proceedings" such that this Court must exercise its supervisory powers. Supreme Court Rule 10(a). To the contrary, the courts below applied the Rule 23 class certification requirements consistent with established precedent of this Court, and the district court properly exercised its discretion to conclude that the existence of individualized issues in this case precluded class certification.

Finally, this case is a particularly weak candidate for review by this Court because Petitioners do not argue that the lower courts applied the wrong rule of law, or misstated the correct rule of law. In fact, the petition ignores this Court's mandate that "careful attention to the requirement of Fed. R. Civ. P. 23 remains . . . indispensible" by giving virtually no attention to the requirements of Rule 23 in the petition. *See Falcon*, 457 U.S. at 157 (quotation omitted). In the end, Petitioners simply take issue with well-reasoned decisions of the lower courts and continue to press their contention that their fiduciary breach claims do not require individualized proof. Such a disagreement with a factual, and entirely discretionary, determination of a district court is not a valid reason for the exercise of this Court's discretion to grant the petition for a writ of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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